they would reconsider Petitioner Hall and similarly situated inmates for parole under the *Parole Decision Guidelines*. In no case did the Board follow the Parole Decision Guidelines or the statutory parole laws, only giving token adjustments of a few months, and continuing a de facto ninety percent to serve policy in order to avoid the exact mathematical ninety percent. The resulting reconsideration of Petitioners and other inmates in the Class were still substantially retroactively extended by an average 5.6 years beyond the parole decision guidelines and still averaged 79% of their judicial sentences in order to continue to satisfy the 85 % VOITIS requirement when averaged with the seven serious violent felony sentences legislatively requiring that 100 percent of judicial sentences be served. (O.C.G.A. § 17-10-6.1).

Robert Hall was sentenced on January 29, 1998 to the maximum fifteen years, with only two years probated, resulting in a judicial sentence of a thirteen years prison sentence. The Board retroactively and unconstitutionally applied their ninety percent to serve policy since his thirteen years sentence on January 29, 1998 which was after the unpublished "effective date" of January 1, 1998. His alleged crime was committed on March 11, 1997, before the effective date of the Board's ninety percent to serve policy and actions in retroactively applying its ninety percent to serve policy to substantially increase his punishment in violation of the Ex Post Facto prohibitions of the United States Constitution. The Parole Decision Guidelines classify vehicular homicide arising from reckless driving as a non-violent level IV offense which when applied to his "excellent" score for likelihood of success on parole, 19 points out of a maximum 20 points, calculate that the recommended months to serve for his offense was 16 months to establish his Temporary Parole Month. The Board's Guidelines providing that inmates serve the greater of one-third of their sentences or the recommended months to serve under the application of the Parole Decisions Guidelines is

not applicable to Plaintiff's level IV offence, only that he serve the recommended months to serve under the Guidelines for a level IV offense. However, the Board slavishly applied their ninety percent to serve policy and set a recommended Tentative Parole Month of May, 2009 which is ninety percent of his thirteen-year sentence with his maximum release date of September 3, 2010. Following the decision of Judge O'Kelley in the *Coleman Jackson v. State Board of Pardons and Paroles*, supra,, the Board ostensibly reconsidered his parole release under the Parole Decision Guidelines without the consideration of the ninety percent to serve policy. But the Board did not in fact consider his release on parole under the Parole Decision Guidelines which calculates his likely release from incarceration after serving 16 months. On November 19, 2002 the Board notified Plaintiff Hall that they had continued to substantially extend his sentence to serve making only a token adjustment of his temporary parole month to September, 2007.

In the underlying case the District Court District denied Plaintiff's Motion for Equitable Relief and Granted the Defendant Board Members Motion for Summary Judgment, November 1, 2004 on the grounds that there is no liberty interest in parole protected by the Due Process Clause in Georgia following, *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994) and that the Plaintiff had not demonstrated that the Board was retroactive extending his sentence to serve in violation of Ex Post Facto. (A-5, A-12). Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the District Court September 13, 2005.

This Petition for Writ of Certiorari involves questions of exceptional constitutional importance of whether the Georgia Board should be constitutional allowed to retroactively substantially extend Petitioner's and similar situated inmates' sentences to serve following their unpublished de facto ninety percent to serve policy.

REASONS FOR GRANTING THE PETITION

The decision of the United States Court of Appeals for the Eleventh Circuit improperly avoided deciding an important federal question which should be decided by the United States Supreme Court as to whether by an unpublished policy a state parole agency can retroactively increase from the statutory one-third threshold and the legislatively mandated Parole Decisions Guidelines to practically foreclose release on parole until a substantially extended sentence of de facto ninety percent for consideration and release on parole of Petitioners and similarly situated inmates in twenty violent offender categories in violation of Ex Post Facto and Due Process protections of the United States Constitution.

The Eleventh Circuit's decision conflicts with decision of other United States Courts of Appeals as well as decisions of this United States Supreme Court. The Third Circuit in *Mickens-Thomas v. Vaughn*, 321 F. 3d 374 (3d Cir. 2003) recently held that a change in discretionary parole policies governing early release by the Pennsylvania Parole Board violated Ex Post Facto, reaffirming that "The presence of discretion does not displace the protections of the Ex Post Facto clause." Citing *Garner*, 529 U.S. at 353. 321 F. 3d 374, 386. The Third Circuit in *Mickens-Thomas* squarely ruled on the same issue in the instant case that a parole agency must rely on the parole laws in place at the time of commission of the petitioner's crime. The issues raised herein have broad application as to whether state parole agencies claiming "unfettered discretion" can constitutionally retroactively substantially increase inmates' sentences to serve beyond their likely sentences to serve for release on parole under the parole laws and guidelines in effect at the time of commission of their offenses.

I. THE GEORGIA PAROLE AGENCY HAS VIOATED EX POST FACTO BY INCREASING THE PETITIONER'S AND SIMILARLY SITUATED INMATES' SENTENCES TO SERVE TO FORECLOSE CONSIDERATION OF THEIR RELEASE ON PAROLE UNTIL SERVING DE FACTO NINETY PERCENT OF THEIR JUDICIAL SENTENCES THAT IS SUBSTANTIALLY BEYOND THE TIME THAT THEY WOULD LIKELY HAVE BEEN RELEASED ON PAROLE UNDER THE STATUTORY PAROLE LAWS AND THE LEGTISLATIVELY MANDATED PAROLE DECISION GUIDELINES IN EFFECT AT THE TIME OF COMMISSION OF THEIR OFFENSES

The fundamental issue involves the Georgia parole agency's adopting and continuing to enforce pursuant to their self proclaimed "unfettered discretion" an unpublished de facto ninety percent to serve policy thereby substantially extended sentences to serve to de facto ninety percent of judicial sentences before consideration for parole of the Petitioner's as well as all inmates in twenty violent and residential burglary offense categories and then retroactively applying this unpublished policy to significantly increase the sentences to serve to Petitioner's and similarly situated inmates' prior offenses beyond their likely release on parole pursuant to the enacted parole laws providing for their likely release on parole after serving the statutory one-third threshold of their judicial sentences and the months to serve calculated pursuant to the legislatively mandated Parole Decision Guidelines in violation of the United States Constitutional protections of Ex Post Facto.

The precedents of the United States Supreme Court in the cases of *Garner v. Jones*, 529 U.S. 244 (2000) and *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) hold that retroactive actions relating to parole violate the Ex Post Facto prohibitions of the United States Constitution when the practical result of implementation of

actions by a parole agency creates a significant risk of prolonging an inmate's incarceration. In both of these cases the United States Supreme Court ruled that a procedural change in the frequency of review for inmates serving life sentences did not necessarily violate the Ex Post Facto prohibitions. But relevant to the instant case in both of these cases the United States Supreme Court instructed that parole actions which retroactively increase the likelihood or sufficient risk of prolonging inmates' incarcerations would violate the Ex Post Facto prohibitions of the United States Constitution. It is patently obvious that the actions of the Board in applying the de facto ninety percent to serve policy to every inmates' existing sentence to serve significantly increasing the duration of their sentence to serve beyond the statutory parole thresholds for release on parole is retroactively increasing their punishment in violation of Ex Post Facto prohibitions. This was the holding of United States District Court Judge O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, supra, which applied to the individual case of Coleman Jackson and he found that it was not necessary for this "policy" to be a law or regulation, only that its "practical implementation" produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. (A-30).

It is a virtual certainty that this retroactive change increases the likelihood and the sufficient risk that the Petitioner's and all other similar situated inmates' extended sentences to serve in the twenty offender categories will be increased at least from the statutory one-third threshold or the months to serve calculated under the parole decision guidelines to a de facto minimum of ninety percent of judicial sentences to serve. After review of the statistical evidence Judge O'Kelley analyzed that "the Board deviated below the 90% threshold in exactly 10 cases out of 8,664. "Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero" and the previous District Court

decision found that "the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates." (A-36). Judge O'Kelley also found that previous to the implementation of the ninety percent to serve policy the plaintiff Coleman Jackson would likely have been paroled in accordance with the tentative parole month calculated under the parole decision guidelines. (A-39).

In the case of the Petitioner as well as similarly situated inmates in the twenty covered offender categories their parole dates remain unchanged or the Board only made a token adjustments of a few months to avoid the exact mathematical ninety percent. The practical effect is that the Board has adopted and continues to follow a policy of following a de facto ninety percent to serve policy retroactive to offenses committed before its effective date. The representative of the Board testified that the updated number of inmates under the ninety percent to serve policy was at least 10,000 with only 18 being released on parole serving less than ninety percent and these were substantially all prosecutorial deals. (Sullivan Deposition, p 16).

The overriding economic motivation for the Respondents' adoption of the ninety percent to serve policy was the fact that the State of Georgia had applied for to become the recipient of very substantial federal grant funds to build new prisons under the Violent Offenders Incarceration - Truth in Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq.* This Act required that the average time to serve of judicial sentences must be at least 85% for a substantially similar list of violent offenses to the Boards' ninety percent to serve policy in order to qualify for the grant funds to build prisons. Specifically, the grant guidelines pursuant to 42 U.S.C. § 13704 (a) (1) require that to be eligible to receive the grant funds to build prisons that within three years:

> "(A) (i) such State has implemented truth in sentencing laws that require persons convicted of a part I violent crime to serve not less than 85 percent of the sentence imposed...(C)(ii) persons convicted of a part I violent crime on average serve not less than 85% of the maximum prison term allowed under the sentence imposed by the court."

In order to qualify for VOITIS grant funds two legislative Bills had been introduced for passage in the Georgia legislature: one which was enacted as O.C.G.A. § 10-10-6.1 requiring that offenders convicted of the seven most serious violent offense categories serve one hundred percent of their sentences, and another, S.B. 100 (1997), which was defeated required that other violent felons serve the extended time of their sentences. After the legislative attempt failed to enact the extended time to serve law for the other violent offense categories, Georgia turned to the Respondent members of the Board to adopt the ninety percent to serve policy having the practical force of law since they exercise exclusive control of parole eligibility. Georgia specifically spotlighted and cited to the Board's ninety percent to serve policy in its VOITIS application for federal grant funds. The Georgia "1998 Application for Violent Offenders Incarceration and Truth in Sentencing Incentive Grant" evidences that the ninety percent to serve policy was adopted to qualify for VOITIS grant funds. This Georgia application explains in bold type the Board's extended time to serve "policy" changes that were in effect tantamount to law in order for Georgia to be eligible for grant funds that: "The new policy makes it mandatory that these violent offenders serve 90% of their court imposed sentence prior to consideration of parole." A 1998 Supplemental Application even attaches a State Board of Pardons and Paroles' news release and explanation of the Board's "Amended Policy for the Parole of Violent Offenders" in order to quality for tier two VOITIS grant

funds. Georgia was then successful and did receive funds through FY 2000 for a total of $82,236,509 received from the federal government under VOITIS

As a result of Judge O'Kelley's holding their ninety percent to serve policy unconstitutional, the members of the Board adopted a Resolution Amendment, dated September 9, 2002, acknowledging the illegality of the retroactive application of the ninety percent to serve policy and provided for reconsideration of parole for all inmates whose offenses were committed before January 1, 1998 "shall be considered for parole under the Parole Decision Guidelines that do not include the ninety percent policy."

The result of the ostensibly "re-considered sentences under the parole decision guidelines" still averaged for the Petitioners and the proposed Class a retroactive increase of 5.6 years to serve above parole decision guidelines (O.C.G.A. § 42-9-40) and average of 79.0% of the judicial sentences verses the one-third of judicial sentences statutory threshold for parole (O.C.G.A. § 42-9-45) for the categories of offenses listed in the ninety percent to serve Resolution of December 9, 1997. The substantially extended sentences to serve of 79% of judicial sentences when averaged in with the inmates required to serve 100% of their judicial sentences whose offenses are listed in the seven serious violent offense legislation (O.C.G.A. § 17-10-6.1) will no doubt comfortably average above the 85% requirement to continue to quality for federal grant funds under VOITIS.

Thus the Faustian deal, motivated to receive VOITIS grant funds, traded the freedom of the Petitioner and many, many other inmates to substantially retroactively extend their sentences to serve de facto ninety percent for the receipt by Georgia of over eighty-two million dollars in federal grant funds to build new prisons. It is constitutionally shocking that in order to receive VOITIS federal grant funds, Georgia did increase its parole threshold for inmates in twenty

offender categories from one-third to de facto ninety percent of judicial sentences by the Respondents administratively adopting an unpublished policy having the practical force and effect of law that substantially and retroactively extended as well as continues to extend Petitioner's and similarly situated inmates' sentences by the de facto ninety percent.

In fact neither the Petitioner nor other inmates in the twenty covered offender categories has been considered for parole in accordance with the parole decision guidelines under which they routinely and likely would have formerly been released on parole on their temporary parole months calculated under the parole decision guidelines.. So the Respondents as members of the Board had to and did maintain at least the grant qualifying 85 % average time to serve for Georgia's violent offenders and is continuing to follow the de facto ninety percent policy to substantially extend the Petitioners' and other similarly situated inmates' sentences to serve retroactively.

Weaver v. Graham, 450 U.S. 24, 30 (1981) teaches: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was proscribed when the crime was consummated." (Emphasis supplied). *Weaver* is in a long line of United States Supreme Court cases holding that Ex Post Facto is violated when a state changes the rules to extend the time for consideration for parole and that state acts must give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. (Emphasis supplied) citing *Dobbert v. Flordia*, 432 U.S. 282, 298 (1977); *Kring v. Missouri*, 107 U.S. 221, 229 (1883), 450 U.S. 24, 28-9. *Weaver* is also instructive that, "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for

past conduct by legislative enactment, under any form, however disguised." Citing *Cummings v. Missouri*, 4 Wall. 277, 325 (1865). 450 U.S. 24, note 15. (Emphasis supplied). Also relevant to the instant case, *Weaver* reaffirmed that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to pleas bargain and the judge's calculation of the sentence to be imposed." Citing *Wolf v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). 450 U.S. 24, 32. *Weaver* concludes: "The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." 450 U.S. 24, 30.

The teachings of Garner v. *Jones*, supra, and *California Department of Corrections v. Morales*, supra, forbid any "practical implementation by the agency charged with exercising discretion", (*Garner* at 255), which created a "sufficient risk" of retroactively increasing an inmates punishment (*Morales* at 509). This "sufficient risk" of retroactively increasing an inmate's punishment arises to a certainty under the Respondents' de facto ninety percent to serve policy which has and continues to retroactive substantially increase Petitioner's punishment beyond his likely incarceration under the enacted parole laws and guidelines in effect at the time of commission of his offense.

II. APPLICATION OF THE UNPUBLISHED NINETY PERCENT TO SERVE POLICY WITHOUT FAIR LEGAL NOTICE TO SUBSTANTIALLY EXTEND SENTENCES TO SERVE BEYOND THE ENACTED PAROLE LAWS AND THE PAROLE DECISION GUIDELINES VIOLATES DUE PROCESS

The District Court's Order and the Eleventh Circuit's Opinion cite *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994) as foreclosing Georgia inmates from making liberty interest due process claims. However, *Sultenfuss* which was decided on the now overruled search for mandatory state language test that in *Sandin v. Conner*, 515 U.S. 472, 483 (1995) was abandoned by the United States Supreme Court in favor of "real concerns under girding the liberty interest protected by the Due Process Clause."

The actions of the Respondents in retroactively increasing the sentences to serve of the Petitioner and similarly situated inmates without legal fair warning violates Due Process. *Sultenfuss* which is a due process case would not apply to the substantial Ex Post Facto violations by the State Board nor is *Sultenfuss* still the law in light of the Supreme Court's subsequent and now controlling decisions of *Garner v. Jones*, supra, *California Department of Corrections v. Morales*, supra, and *Sandin v. Conner*, supra. The practical realities test of *Garner* and *Morales* to determine a sufficient risk of Ex Post Facto violation and the real concerns under girding the liberty interest protected by the Due Process clause announced in *Sandin* now determine protected liberty interests, not the presence or absence of state mandatory language. The Supreme Court has now held that the "Due Process clause of its own force" may create a protected liberty interest" (*Sandin* at 474) and that the practical realities of creating a sufficient risk of retroactively increasing an inmate's punishment violate Ex Post Facto (*Morales* at 509 and *Garner* at 255). Thus, the controlling Supreme Court law has changed from *Sultenfuss*' state

mandatory language analysis to now look to the practical realities of the state action under *Sandrin* which the Georgia Board has retroactively created as a very substantial and certain retroactive increase in the Petitioner's and similarly situated inmates' sentences to serve. The real concerns of Due Process when viewed against the Ex Post Facto practical realities of what the Georgia Board has done to retroactively and substantially increase the sentences of inmates should at least recognize their liberty interest not to have their Due Process rights continue to be egregiously violated without legal fair warning.

The ninety percent to serve policy was recently declared illegal by Judge Bedford in *Griffin, et al. v. Nix, et al.*, Georgia Superior Court of Fulton County, Civil Action No. 2004-CV-92152 (March 3, 2005) which held the Board's ninety percent to serve policy "illegal and has no force or effect" because it was not filed or published in accordance with the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-3. As the result of the decision the Board has subsequently publicly announced on March 10, 2005 that they have abandoned the ninety percent to serve policy. They also reaffirmed in the same news release their extended sentences to serve policy announcing that, "the vast majority of these inmates can expect to serve most of their sentence in prison." Their continued substantially extended sentences to serve policy has continued the retroactive substantially increased sentences to serve of the Petitioner and approximately 10,000 other similarly situated inmates in the covered offender categories and in not a single case has the Respondents followed the enacted parole laws and the legislatively mandated Parole Decision Guidelines thereby continuing their retroactive substantially increased sentences to serve in violation of Ex Post Facto.

Yet an unpublished de facto ninety percent to serve policy is slavishly continued to be enforced as a de facto law and its effect on the Petitioner and similar situated inmates is

to practically completely foreclose any opportunity for parole until they have served a de facto ninety percent or more of their judicial sentences It gives no legal notice to the public, and is not a policy, rule or regulation pursuant to which the Board may validly enforce their de facto ninety percent to serve policy to extend the duration of inmates' sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

It is obvious that the Respondents' actions as members of the Board under color of law in retroactively applying the de facto ninety percent to serve policy has significantly increased the duration of the sentences to serve of the Petitioners and similarly situated inmates beyond the statutory parole thresholds which was and still is being retroactively applying the extended de facto ninety percent policy in violation of the Ex Post Facto prohibitions and Due Process protections of fair warning.

III. DUE PROCESS AND FEDERAL RULES OF CIVIL PROCEDURE ARE VIOLATED WHEN THE PETITIONER IS DENIED DISCOVERY OF EVIDENCE NECESSARY TO PROVE HIS CASE THAT IS SECRETED EXCLUSIVELY IN THE FILES OF THE GEORGIA PAROL AGENCY AS "CONFIDENTIAL STATE SECRETS'

Petitioner sought discovery to seek an in camera inspection of his parole file as well as statistics and documents from the Board which would have demonstrated that the Board has in fact been following a de facto extended sentence to serve policy retroactively applied to substantially extend the punishment of all inmates committing violent offenses and residential burglary. It is submitted that the statistics and documents will demonstrate that in not a single inmate in violent offender categories has been considered for release on parole in accordance with the parole laws and the Parole Decision Guidelines as well as demonstrating that

every inmate including Petitioner has been retroactively extended de facto almost triple their punishment substantially beyond their likely sentences to serve under the parole laws and the published Parole Decision Guidelines in effect at the time of commission of their offenses.

The Petitioner's complete parole file can only be reached by the District Court granting an *in camera* inspection because of the imprimatur of "confidential state secrets" on Plaintiff's and all inmates' parole files pursuant to O.C.G.A. § 42-9-53 (b). How else could the Petitioner have proven the Respondents' pattern and practice of retroactively substantially extending his sentence to serve except from Board generated statistics as well as documents in his parole file? The Respondents who always secret their flies including the Petitioner's parole file behind O.C.G.A. § 42-9-53 as "confidential state secrets", opposed discovery and an *in camera* inspection, and the trial judge granted the Respoondents' Motion for Summary Judgment without granting the *in camera* inspection or any other discovery from the Respondents. The Petitioner also sought statistics to demonstrate the very substantial extended sentences to serve that the Respondents as members of the Board have retroactively exacted increasing the punishment of the Petitioner as well as engaging in a de facto pattern and practice of substantially extending sentences to serve of all similarly situated inmates.

In *WSB-TV v. Lee*, 842 F. 2d 1266, 1269 (11th Cir. 1988) the Eleventh Circuit pointed to three United States Supreme Court cases vacating appellate reversals of district court orders granting summary judgment illuminate both the utility and the limitations of summary procedure. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574 (1986). Their common denominator is the United States Supreme Court's caveat that summary judgment

should only be decided upon an adequate record. The Eleventh Circuit in *WSB-TV* held that summary Judgment was not proper when the adverse party did not have an adequate opportunity for discovery. In *Celotex*, the Supreme Court held that "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" but only "after adequate time for discovery." 477 U.S. at 322-323 (Emphasis supplied). And the District Court even referred to *Kerr v. United States District Court for the Northern District of Georgia*, 426 U.S. 394, 405 (1976) emphasizing "that an in camera review of documents 'is a relatively costless and eminently worthwhile method' of ensuring a balance between a plaintiff's need for documents and the government entity's claim of privilege."

The Eleventh Circuit in *Jones v. City of Columbus*, 120 F.3d 248 (11th Cir. 1997) held that, "The law in this circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion. *See, e.g., Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870-71 (11th Cir.1988); *WSB-TV v. Lee*, supra at 1269. In *Snook*, this court stated:

> The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits... If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the

> requested materials... Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests.

The issues is not whether an inmate is entitled to see his entire parole file as in *Snook*, but the issue is whether access to the courts can be effectively denied by denying relevant discovery even though *in camera* inspection to discover elements of necessary evidence for an inmate's cause of action.

The Respondents cannot cloak their actions in secrecy to deny a litigant access to relevant information and documents. The courts have always had the power to disregard an agency's self-designation of their privilege to withhold relevant documents which are ordered by the court to be produced and the agency's designation or even the legislative designation is not binding on the court. A trial court should not permit control over the relevant evidence to be left to the discretion of an agency designation of privilege or even to the President of the United States maintaining that executive documents are privileged. See *Nader v. Butz*, 60 FRD 381 (D.C.D.C. 1973) and its Watergate progeny.

It would be a denial of fair play and substantial justice to permit the Respondents to avoid a serious constitutional deficiency in their administration of paroles in the State of Georgia by maintaining that its files are confidential and therefore can not provide the proof necessary to demonstrate the unconstitutional conduct and its irreparable injury to Petitoiner and other similarly situated inmates who are entitled to be released under the controlling parole laws and Parole Decision Guidelines in effect at the time of commission of their alleged offenses. The claim of secrecy of the files and even the votes of the members in granting or denying parole when coupled with their self-serving claim of unfettered discretion creates a very unusual

confluence of secret unchecked power. It is submitted the underlying instant case, which brings into focus the Respondents attempt to enforce an unofficial and unpublished policy that disregards the controlling parole laws, arises out of this secrecy milieu. The recent revelations of the "Board" making decisions by only staff or by one member acting in violation of the Georgia parole laws and even the Board's rules and regulations are symptomatic of the infectious secrecy that pervades the Boards proceedings and its self- proclaimed "unfettered discretion." It is time that this Star Chamber secrecy should be brought into the twentieth-first century to allow the obviously relevant discovery and documents to be seen in the light of the Federal Rules of Civil Procedures.

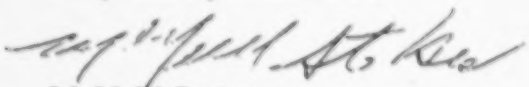
It is a fundamental violation of Due Process for the Defendants to deny Petitioner discovery of the only possible evidence exclusively in their files to support his cause of action and then maintain that they are entitled to summary judgment because the Petitioner cannot produce evidence which they stonewalled. Such a catch 22 result is legally absurd.

CONCLUSION

The retroactive application of the de facto ninety percent to serve policy substantially extending sentences to serve beyond the time that Petitioner and similarly situated inmates would likely have been released on parole violated the Ex Post Facto and Due Process protections of the United States Constitution. This case involves one of the most massive civil rights abuses of the latter part of the twentieth century encompassing over ten thousand inmates including Petitioner who have had their sentences to serve retroactively almost tripled and have been de facto foreclosed from parole under the enacted parole laws and mandated guidelines.

The Georgia Board members may be the only exception in the criminal justice system without any of the traditional checks and balances of the republic and even secreting the documents on which they base their decisions without any hearings in Star Chamber secrecy. The Board is constitutionally independent of the executive branch. Claiming "unfettered discretion" they refuse to follow the enacted parole laws and they do not follow the legislatively mandated Parole Decision Guidelines maintaining that they can and do in every case depart from the enacted parole laws and guidelines to retroactively de facto almost triple sentences to serve in the twenty categories. There may not be any supervision either by the courts which continue ducking the issues letting the Georgia Board have their self proclaimed unfettered discretion uniquely unchecked by our constitutional protections. Madison cautioned that "temporary deviations from fundamental principle are more or less dangerous because once the deviation is made it becomes the rule."

Respectfully Submitted,



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No. _____

In The Supreme Court of the United States

ROBERT FORD HALL,

Petitioner,

v.

MILTON E. NIX, JR.; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; J. MICHAEL LIGHT; AND MICHELLE MARTIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
September 13, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-16062
Non-Argument Calendar

D.C. Docket No. 03-00204-CV-WC0-2

ROBERT FORD HALL,

Plaintiff-Appellant,

versus

MILTON E. NIX, JR.,
GARFIELD HAMMONS, JR.,
BETTY ANN COOK,
EUGENE P. WALKER,
J. MICHAEL LIGHT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Georgia

(September 13, 2005)

Before EDMONDSON, Chief Judge, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Robert Ford Hall, an inmate in the Georgia prison system, appeals the district court's grant of summary judgment in favor of Defendant-Appellees, members of the Georgia State Board of Pardons and Paroles (the "Board"), dismissing Hall's section 1983 claims, 42 U.S.C. §1983. No reversible error has been shown; we affirm.

Hall was convicted of vehicular homicide arising from reckless driving and of a separate misdemeanor charge of driving while it was less safe to operate a vehicle. The acts for which he was convicted were committed in March of 1997. For these crimes, Hall was sentenced to a fifteen-year term, with thirteen years to serve and the balance probated. The Board first considered Hall for parole under a policy that required inmates convicted of one or more of some twenty enumerated offenses to serve ninety percent of their sentences before becoming eligible for an initial parole hearing. Under this policy -- adopted by the Board after Hall committed acts of conviction[1] -- Hall's tentative parole month ("TPM") was determined by the Board to be May 2009. Absent this policy change, Hall's TPM would have been calculated under the grid system of the Parole Decision Guidelines; under the grid system, Hall's TPM would have required -- subject to discretionary adjustment by the Board -- considerably fewer months-to-serve.

The retroactive application of the 90 percent-to-serve policy to inmates whose offense conduct pre-dated adoption of that policy was determined to constitute an ex post facto

[1] The Board adopted this 90 percent-to-serve policy on 9 December 1997 and applied it to all inmates convicted after 1 January 1998.

violation in Jackson v. State Board of Pardons and Paroles, No. 2:01-CV-068-WCO; 2002 WL 1609804 (N.D.Ga. 2002).[2] After the Jackson decision, the Board resolved (i) to apply the 90 percent-to-serve policy only to those offenders who committed their crimes on or after 1 January 1998; and (ii) to reconsider for parole those offenders who committed their offenses before 1 January 1998 to whom the 90 percent-to-serve policy had been applied.

Hall takes issue with the Board's post-Jackson calculation of his TPM. Hall argues that the Board's ostensible reconsideration of his parole release date was a sham; according to Hall, only a token adjustment was made to mask the Board's continued ex post facto application of its 90 percent-to-serve policy. Hall claims he was entitled to a TPM under the Guidelines grid score -- 16 months -- as opposed to the 120 months-to-serve determined by the Board in its post-Jackson reconsideration of Hall's TPM. Hall contends that the Board's acts are in violation of constitutional protections under the ex post facto and due process clauses.

About Hall's ex post facto claim, the district court concluded that Hall had proffered insufficient evidence that a new law or regulation or policy was being retroactively applied by the Board. We agree. While Hall is long on hyperbole, he is short on evidence to support his conclusory allegations. Naked accusations are no substitute for evidence and do not defeat summary judgment. See Leigh v. Warner Bros. Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (conclusory allegations without specific facts in support have no probative value). The record reflects that the Board exercised its discretion to deviate from the Parole Guidelines grid score

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[2] We assume for purposes of this appeal -- and the Board does not argue otherwise -- that, as the Jackson court concluded, application of the Board's 90 percent-to-serve policy to inmates whose crimes were committed before the policy was adopted would implicate the ex post facto clause.

based on specific reasons set our in the Board's notice dated 29 September 2003.[3] No sufficient facts were proffered to create a material issue of fact on Hall's ex post facto allegations. The record shows that Hall is being required to serve more of the sentence imposed for his acts because of the Board's exercise of discretion; the record fails to support Hall's claim that a new law, rule or policy is being retroactively applied.

About Hall's due process claims, the district court concluded correctly that, under Sultenfuss v. Snow, 35 F.3d 1494, 1502 (11th cir. 1994), Hall has no cognizable liberty interest in parole. See Sultenfuss, ("[v]iewing Georgia's parole system in its entirety, we conclude that no protected liberty interest in parole is created"); Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001) (Georgia inmates are foreclosed by Sultenfuss from making a liberty interest due process claim based on state law and no federal constitutional right to parole exists independent of a state created liberty interest).

AFFIRMED.

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[3] The Board twice reconsidered Hall's TPM after the Jackson decision. In November 2002, the Board determined to require Hall to serve 120 months before parole, 20 months less than the period required under the 90 percent-to-serve policy. The Board's calculations were based on a crime severity level of V. Hall's crime severity level was later corrected to be a crime severity level of IV. Nonetheless, on 29 September 2003, when the Board again reconsidered Hall's TPM in the light of the level IV correction, it determined that no change in Hall's TPM was warranted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

ROBERT FORD HALL,	:	
	:	
Petitioner,	:	PRISONER HABEAS CORPUS
	:	28 U.S.C. §§2241, 2254
vs.	:	
	:	
MILTON E. NIX, JR.,	:	CIVIL ACTION
GARFIELD HAMMONDS,	:	NO:2:03-CV-204-WCO
JR., BETTY ANN COOK,	:	
EUGENE P. WALKER,	:	
J. MICHAEL LIGHT, and	:	
MICHELLE MARTIN,	:	
	:	
Respondents.	:	
	:	

ORDER

This case is currently before the court on the respondents' motion for summary judgment [18-1]. The court held a hearing on the motion on September 8, 2004.

I. Background

A. Material Facts

The following information comes from the parties' material facts to which there exists no genuine dispute unless otherwise noted. The material facts contained in the respondents' statement which are not specifically controverted by the petitioner in his response shall be deemed to have been admitted. LR 56.1(B)(2), NDGa.

On January 29, 1998, petitioner Robert Ford Hall was convicted in the Superior Court of Paulding County of vehicular homicide arising from reckless driving and of a separate misdemeanor charge of driving while it was less safe to operate a vehicle. For the homicide by vehicle charge, he received a fifteen year sentence, with thirteen years to serve and the balance probated. For the other charge, he was sentenced to twelve months, to run concurrently with the homicide by vehicle sentence. The crimes were committed in March of 1997.

On December 9, 1997, the Board of Pardons and Paroles ("Board") adopted a resolution altering, but not amending under the Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq., the Board's Parole Decision Guidelines System to provide that for any offender convicted on or after January 1, 1998 of vehicular homicide while driving under the influence, or homicide by vehicle or nineteen other specified crimes, the guidelines recommended time to serve would be at least ninety percent of the court-imposed prison sentence, regardless of the grid component "score" of the offender.

The petitioner was considered for parole under the parole decision guidelines system and was notified of the Board's decision in a Notice of Tentative Action dated January 26, 1999. The grid component of the guidelines system recommended thirty-four months to serve. Because the Board erroneously believed that the petitioner was convicted of homicide by vehicle while driving under the influence (DUI) and was subject to the ninety percent resolution, the recommended Tentative Parole Month was May 2009, after he had served ninety percent of his sentence.

On September 9, 2002, in response to findings by this court, the Board amended its ninety percent resolution for offenders convicted of homicide by vehicle while DUI and the other specified crimes to provide that the resolution shall

be applied only to those offenders who committed their crimes on or after January 1, 1998. The amendment to the resolution also provided that those offenders previously considered for parole under the ninety percent resolution who committed their offenses before January 1, 1998 shall be reconsidered for parole under parole decision guidelines that do not include the ninety percent recommendation. The petitioner alleges that this reconsideration was not given.

The Board maintains that it has the discretion to disagree with a recommendation under the guidelines system and make an independent decision to deny parole or establish a Tentative Parole Month at any time prior to the expiration of the petitioner's sentence. The petitioner disagrees and argues that the Board may depart from the guidelines only under specific conditions delineated in O.C.G.A. § 42-9-42(c) which were not present in this case.

B. Procedural Background

The petitioner filed a motion for equitable relief under Federal Rule of Civil Procedure 65 to enjoin the respondents as members of the State Board of Pardons and Paroles from retroactively enforcing a ninety percent-to-serve policy that the petitioner alleges substantially increased his sentence. The petitioner also filed a motion for writ of habeas corpus in accordance with 28 U.S.C. §§ 2241 and 2254. He alleged that the respondents, members of the state's Board of Pardons and Paroles, are violating O.C.G.A. § 42-9-45 and the ex post facto and due process clauses of the Constitution. The respondents, in turn, filed a motion to dismiss for lack of exhaustion of state remedies. The petitioner provided no compelling argument to merit injunctive relief, and the petitioner's motions for equitable relief and writ of habeas corpus were denied [17-1]. The respondents' motion to dismiss for lack of exhaustion was also denied [17-1].

II. Motion for Summary Judgment

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those claims for which there is no need for a factual determination and for which there is a clear legal basis are properly disposed of through summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. See, e.g., Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). To survive a motion for summary judgment, the non-moving party need only present evidence from which the trier of fact might return a verdict in his favor. Id. at 1330. Consideration of a summary judgment motion does not lessen the burden on the non-moving party; the non-moving party still bears the burden of coming forth with sufficient evidence. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990). "If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted." Herzog v. Castle Rock Entertainment, 193 F.3d 1241, (11th Cir. 1999) (internal citation omitted).

III. Analysis

The petitioner's complaint, filed in this court on November 7, 2003, consisted of three counts [1-1]. Count I was a motion for a writ of habeas corpus. Count II of the petitioner's complaint requested equitable relief. Petitioner filed a separate motion for writ of habeas corpus and

equitable relief on February 13, 2004 [11-1], which this court denied in its order of June 23, 2004 [17-1]. The third count of the petitioner's complaint seeks damages for alleged ex post facto and due process violations. Because the first two counts were effectively disposed of through court order on the petitioner's separate motions, this order will address only the third count, the petitioner's request for damages.

A. Petitioner's Right to Due Process

In order to establish that the Board violated the petitioner's due process rights, the petitioner must first show that he has a liberty interest in parole. Sultenfuss v. Snow, 35 F.3d 1494, 1499 (11th Cir. 1994) (en banc), cert. denied, 513 U.S. 1191 (1995), citing Ky. Dep't of Corr. V. Thompson, 490 U.S. 454, 461 (1989). The Georgia parole system can be said to create a presumption against parole and does not create a legitimate expectation of parole, so there is no liberty interest in parole protected by the due process clause. Sultenfuss, 35 F.3d at 1501-02. The purpose of the parole decision guidelines is to assist the Board in making decisions that are consistent and based on sound reasoning, but the Board may disagree with the recommendation of the guidelines and "make an independent decision to deny parole or establish a Tentative Parole Month at any time prior to sentence expiration." Id. at 1496-97, quoting Ga. R. ch. 475-3-.05.

The petitioner argues that Sultenfuss is no longer good law in light of several Supreme Court decisions. See Garner v. Jones, 529 U.S. 244 (2000); Sandin v. Conner 515 U.S. 472 (1995); Cal. Dep't of Corr. v. Morales, 514 U.S. 499 (1995). The petitioner's reliance on these decisions is misplaced. Although these cases all deal with the ex post facto clause of the Constitution, they do not alter the Eleventh Circuit's decision in Sultenfuss that prisoners in Georgia have no liberty interest in parole. See Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001), citing Sultenfuss, 35 F.3d

1494 ("a Georgia inmate has no liberty interest in parole").

B. Application for Ex Post Facto law to Petitioner

The petitioner is correct in his argument that the retroactive application of the Board's ninety percent policy to his case would be a violation of the ex post facto clause. See Jackson v. State Board of Pardons & Paroles, 2:01-cv-68-WCO (May 29, 2002).Despite the petitioner's allegations to the contrary, however, exhibits attached to the brief filed by the petitioner in the Superior Court of Fulton County [16-1] indicate that the respondents have reconsidered his parole date in light of this court's decision in Jackson barring the ex post facto application of the ninety percent policy. By simply calling the reconsiderations a "sham," the petitioner does not raise sufficient evidence of any ex post facto violation. Sufficient evidence to defeat summary judgment cannot be mere conclusory allegations by the non-moving party. "Conclusory allegations and assertions are insufficient to create a disputed issue of material fact." Weed Wizard Acquisition Corp. v. A.A.B.B., Inc., 201 F. Supp. 2d 1252, 1255 (N.D. Ga. 2002) (Story, J.) (internal citations omitted).

No new law or regulation, including the Board's ninety percent policy, is being retroactively applied in connection with petitioner's parole reconsideration, and no greater punishment has been imposed. The petitioner is simply required to serve more of his sentence as initially imposed by the Superior Court of Paulding County.

IV. **Conclusion**

Because the petitioner has failed to sufficiently prove due process or ex post facto violations to defeat summary judgment in favor of the respondents, the court will not address the issue of immunity. The respondents' motion for summary judgment is hereby **GRANTED** [18-1].

IT IS SO ORDERED, t his 1st day of November, 2004.

s/William C. O'Kelley
Senior United States District Judge

FILED IN CHAMBERS
6/233/04
Luther D. Thomas, Clerk
s/_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

ROBERT FORD HALL,	:	
	:	
Petitioner,	:	PRISONER HABEAS CORPUS
	:	28 U.S.C. §§2241, 2254
vs.	:	
	:	
MILTON E. NIX, JR., GARFIELD HAMMONDS, JR., BETTY ANN COOK, EUGENE P. WALKER, J. MICHAEL LIGHT, and MICHELLE MARTIN,	:	CIVIL ACTION NO:2:03-CV-204-WCO
	:	
Respondents.	:	
	:	

ORDER

This case is before the court on the petitioner's motion for equitable relief [11-1] and for writ of habeas corpus [11-2] and the respondents' motion to dismiss for lack of exhaustion [14-1].

The petitioner has filed a motion for equitable relief under Federal Rule of Civil Procedure 65 to enjoin the respondents as members of the State Board of Pardons and Paroles from retroactively enforcing a ninety percent-to-serve policy that the petitioner alleges substantially increased his sentence. The petitioner also has filed a motion for writ of habeas corpus in accordance with 28 U.S.C. §§ 2241 and 2254. He alleges that the respondents, members of the state's Board of Pardons and Paroles, are violating O.C.G.A. §42-9-45 and the ex post facto and due process clauses of the Constitution. The respondents, in turn, have filed a motion to dismiss for lack of exhaustion of state remedies.

Background

In 1995, the legislature enacted O.C.G.A. § 17-10-6.1, which required prisoners convicted of any of seven different crimes to serve 100 percent of their sentences before being paroled. The ninety percent rule, which required certain classes of convicted criminals to serve ninety percent of their sentences before becoming eligible for a parole hearing, failed to pass the legislature. The Board of Pardons and Paroles nonetheless adopted a ninety percent policy in 1997, which took effect January 1, 1998 and was applied retroactively to prisoners convicted before that date. Before this policy went into effect, prisoners were eligible to be considered for parole after serving the greater of one-third of their sentences or the recommended number of months under the Parole Decisions Guidelines. In the case of Jackson v. State Board of Pardons & Paroles, this court found that the ex post facto application of the Board of Pardons and Paroles' ninety percent policy was unconstitutional as applied to that petitioner. 2:01-cv-68-WCO (May 29, 2002). After the court's ruling in Jackson, the Board of Pardons and Paroles determined that it was illegal to retroactively apply the ninety percent rule and provided for reconsideration of the parole date for all inmates whose offenses were committed before 1998. The

petitioner alleges that the respondents have failed to reconsider the petitioner for parole and have continued to apply the ninety percent rule, varying the dates by only a few months.

January 15, 1998, the petitioner was convicted of vehicular homicide by reckless driving and a separate count of driving under the influence for events that transpired on March 11, 1997. On January 29, 1998, he was sentenced to thirteen years in prison with a maximum release date of September 2, 2011. Under the Parole Decision Guidelines of O.C.G.A. § 42-9-40, the petitioner would serve sixteen months before becoming eligible for parole, putting his parole date in May or June of 1999. With the ninety percent policy that took effect January 1, 1998, the petitioner's parole month became May 2009. Currently, the petitioner's parole month is September 2007.

On April 14, 2003, the petitioner filed a writ in Fulton County Superior Court to reduce his criminal classification from a level five to a level four and to obtain mandamus relief from the respondents' alleged retroactive application of the ninety percent policy. On August 28, 2003, his writ was granted in part and denied in part: his criminal classification was reduced from Class V to Class IV, but his petition for mandamus relief was denied. The Georgia Court of Appeals and Georgia Supreme Court declined to hear his appeals.

Ninety Percent Policy

The petitioner alleges that with the application of the ninety percent rule, the average prisoner's parole date is increased by more than five years compared to the Parole Decision Guidelines. The petitioner's current release date has him serving seventy-nine percent of his sentence before he is eligible for parole. The petitioner argues that the respondents violated the ex post facto clause of the

Constitution if the practical result of the parole agency's actions led to a sufficient risk of prolonging an inmate's incarceration. Lynce v. Mathis, 519 U.S. 433 (1997). Although the petitioner's statement of law is true, nothing presented by the plaintiff shows that the ninety percent rule has been applied in this case. The respondents argue that the petitioner is not entitled to equitable relief because the statute of limitations has run, the parole board did reconsider the petitioner's parole date without using the ninety percent policy, the harm to the petitioner does not outweigh the harm to the respondents as the petitioner has received parole consideration, and releasing the petitioner early would be adverse to the public interest.

No injunction is merited at the present as there is no evidence that the respondents are using the ninety percent policy in an ex post facto application. To obtain preliminary injunctive relief, a movant must demonstrate "(1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest." Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985); see also Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995). If the petitioner fails to show any of the four prerequisites, the court will deny injunctive relief. Moreover, although injunctive relief is extraordinary in and of itself, mandamus is an "extreme form of equitable relief." Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1221 (11th Cir. 2002), citing Corn v. Lauderdale Lakes, 904 F.2d 585, 587 (11th Cir. 1990).

The petitioner has not met his burden of showing he is entitled to such extraordinary relief. Although he has alleged that the respondents have not reviewed his case in light of the court's ruling that the ninety percent rule was

unconstitutional when applied ex post facto, he has attached as exhibits to his brief in response to the respondents' motion to dismiss documents which indicate that the respondents have reviewed his case and reduced the time he must serve before he is eligible for parole. Letters provided to the court by the petitioner indicate that his parole month was considered without the ninety percent rule. [15-1, Exhibit A]. The present lawsuit seeks early release, to which the petitioner is not entitled, rather than parole consideration, which he has already received.

Exhaustion

The respondents move for the petitioner's claims to be dismissed for lack of exhaustion. They argue that the petitioner has not filed his federal constitutional claims in any state court. On April 14, 2003, the petitioner applied for a writ of mandamus in superior court. In a follow-up lawsuit, the petitioner applied for a motion for contempt because the respondents allegedly did not reconsider the petitioner's parole date. The court denied this motion, stating that the board has the discretion to deviate substantially upward from the parole guidelines. The respondents argue that the petitioner has not yet filed for a writ regarding the parole board's most recent reconsideration of his parole date.

The exhaustion doctrine is spelled out in 28 U.S.C. § 2254(b)(1)(A). It provides that the filing must refer specifically to the federal law and the alleged error in the state court; similarity of claims is insufficient. It applies to all habeas corpus actions, including those brought under 28 U.S.C. § 2241. The petitioner must file in state court under a writ of mandamus, not a habeas petition. The respondents allege that the petitioner raised only state, not federal, claims in state court. The petitioner therefore has a state remedy available, the respondents argue.

The petitioner responds that he raised all applicable

arguments in Fulton County Superior Court. He also argues that his § 1983 claims are not subject to the exhaustion requirement, and his § 1983 claims comprise some of his complaint in addition to the writs. It is true that the petitioner's § 1983 claims are not subject to the exhaustion requirement, and the petitioner's applications for state relief indicate that he has raised the issues in state court for which he seeks relief in this court. The petitioner's bench brief [16-1], filed in Fulton County Superior Court, argues in part that the ninety percent rule is in violation of the ex post facto clause of the United States Constitution and violates due process. He argues that the parole board must give him initial consideration after one third of his sentence has been served.

Conclusion

Despite the petitioner's allegations to the contrary, exhibits attached to the brief filed by the petitioner indicate that the respondents have reconsidered his parole date in light of this court's decision in Jackson v. State Board of Pardons & Paroles, 2:01-cv-68-WCO (May 29, 2002), barring the ex post facto application of the ninety percent policy. The petitioner has provided no compelling argument to merit injunctive relief. Therefore, the petitioner's motion for equitable relief is hereby **DENIED** [11-1]. The petitioner's motion for writ of habeas corpus is **DENIED** [11-2]. The respondents' motion to dismiss for lack of exhaustion is **DENIED** [14-1].

IT IS SO ORDERED, this 23rd day of June, 2004.

s/William C. O'Kelley
William C. O'Kelley
Senior United States District Judge

FILED IN CLERK'S OFFICE
U.S.D.C. – Gainesville
MAY 30, 2002
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

COLEMAN JACKSON,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL NO.
	:	2:01-CV-068-WCO.
STATE BOARD OF PARDONS &	:	
PAROLES; DEPARTMENT OF	:	
OFFENDER REHABILITATION	:	
OF THE STATE OF GEORGIA,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of plaintiff's motion for equitable judgment [7-1].

I. Background

Plaintiff is currently confined at the Hall County Correctional Institute pursuant to an August 4, 1999 conviction for aggravated assault in the Superior Court of Fulton County, Georgia. See State v. Jackson, No. Z85142 (Ga.Super. Ct. filed Dec. 20, 1996). Based upon a grand jury indictment charging him with "unlawfully commit[ting] an

assault upon the person of Shirley Ann Welch, by shooting at, toward, and in her direction with a pistol, and by striking and beating her with a pistol," the court sentenced plaintiff to confinement for a period of twenty years, with five years to serve (Pl.'s Ex. 5 at 33; Def.'s Ex. 4 at 2).[4] Plaintiff did not appeal his conviction or sentence.

As of August 25, 1996, the date of plaintiff's offense, the Georgia General Assembly required prisoners convicted of aggravated assault to serve a minimum of "one-third of the prison term imposed by the sentencing court" before becoming eligible for an initial parole hearing before the State Board of Pardons & Paroles ("the Board"). O.C.G.A. § 42-9-45(f) (2002). Nevertheless, on December 9, 1997, the Board adopted a resolution amending its statutory guidelines "to provide that any offender who is convicted on or after January 1, 1998, of one or more of [twenty enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison" (Pl.'s Ex. 1 at 1; Def.'s Ex. 2 at 2 ("90% time-served policy")). The Board's new 90% time-served policy thus increased the minimum number of months-to-serve for certain offenses, including plaintiff's, postponing the date of the earliest possible parole eligibility hearing until service of 90%, rather than one-third, of the inmate's prison sentence. Further, the Board applied its new policy retroactively; the policy applied to all covered convictions entered on or after January 1, 1998 even though, in many cases, the underlying criminal conduct had taken place prior to that date.

On October 2, 2000, the Board informed plaintiff that his recommended tentative parole month ("TPM"), the date

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[4] Unless otherwise indicated, "Ex." refers to exhibits admitted at the evidentiary hearing held in connection with this matter on April 10, 2002.

upon which he would tentatively be entitled to his first parole eligibility hearing, had been scheduled for June of 2003 (Pl.'s Ex. 5 at 18; Def .'s Ex. 5). Plaintiff challenged his TPM by letter of October 24, 2000, requesting that the Board re-evaluate his parole eligibility (Pl.'s Ex. 5 at 16; Def.'s Ex. 3 at 16). In response, the Board informed plaintiff that, pursuant to its newly adopted 90% time-served policy, plaintiff "must serve 90% or 54 months of his sentence before any parole," and that "the Parole Board [would] not reconsider its decision...." (Pl.'s Ex. 5 at 13; Def.'s Ex. 3 at 13).

Consequently, plaintiff renewed his request for reconsideration by the Board, while also challenging his TPM before Georgia's Superior Courts Sentence Review Panel (Pl.'s Ex. 5 at 10, 12; Def.'s Ex. 3 at 10, 12). In both instances, plaintiff argued that the Board's decision to apply its 90% time-served policy to his offense retroactively increased the punishment inflicted upon him by the State of Georgia, in violation of the Ex Post Facto Clause of the United States Constitution. See U.S. Const. Art. I, § 10, cl. 1. Plaintiff's requests were subsequently denied on February 23, 2001 and March 27, 2001, respectively (Pl.'s Mot. for Equitable J., Ex. 4; Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8). In its March 27, 2001 letter to plaintiff, the Board observed that "[m]any inmates whose offenses were committed prior to January 1, 1998, but were convicted after January 1, 1998, as was [plaintiff], have been considered under the Board's 90% policy ... The Board is unwilling to deviate from the manner in which this policy has been adopted and implemented" (Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8).

Thereafter, on April, 25, 2001, plaintiff filed a joint motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a complaint for damages pursuant to 28 U.S.C. § 1983[1-1], re-asserting his Ex Post Facto Clause challenge in this court. United States Magistrate Judge John R. Strother, Jr. subsequently issued a report and recommendation ("R &

R") [6-1] recommending that plaintiff's § 2241 petition be dismissed without prejudice for failure to exhaust his available state remedies, see 28 U.S.C. § 2254(b)(1) (2001); that Georgia's Eleventh Amendment immunity warranted the dismissal of plaintiff's § 1983 claims for money damages, see U.S. Const. amend. XI; Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); and that plaintiff's § 1983 Ex Post Facto claim otherwise be permitted to proceed.

Over plaintiff's objections [7-1], the court adopted Judge Strother's R & R as the order of this court on March 7, 2002[8-1]. Yet, the court was unable to resolve plaintiff's motion for equitable judgment respecting plaintiff's surviving § 1983 claim [7-1], a motion that plaintiff had haphazardly incorporated into his objections to the magistrate's R & R. Specifically, the court noted that plaintiff's motion for equitable judgment, in which he sought to enjoin the Board's enforcement of the 90% time-served policy against him, was not in proper form. Plaintiff had failed to attach any affidavits in support of his factual contentions, in violation of Local Rule 7.1, see L.R. 7.1, NDGa., and plaintiff's factual allegations were insufficiently developed to properly adjudicate the motion. Nevertheless, the court determined that on its face, "[the Board]'s retroactive application of its 90% time-served policy to [plaintiff] [was] constitutionally suspect" (Order at 10). Accordingly, the court set the matter for an evidentiary hearing on April 10, 2002[9-1], at which time the Board was ordered to show cause, if any, why plaintiff's motion for equitable judgment should not be granted.

II. The April 10, 2002 Hearing

At the April 10, 2002 hearing, the Board offered testimony from Ms. Tracy D. Masters ("Masters"), Director of the Board's Legal Services Division; Mr. Michael P. Sullivan ("Sullivan"), Director of the Board's Clemency Administration & Parole Selection Division; and Mr. Steve

Baustin ("Baustin"), an Officer in the Board's Hearing Examiner Unit for Parole Decision Guidelines.

Baustin is one of ten hearing examiners responsible for the calculation of parole eligibility data and a TPM date for each inmate, which is then submitted to the Board for review. The Board thereafter votes to accept or reject the hearing examiner's recommendation. Although Baustin did not personally conduct the initial "months-to-serve" calculation respecting plaintiff's parole eligibility, he briefly outlined the standard procedure each examiner employs:

A. The Initial TPM Recommendation

First, the examiner identifies the inmate's "Crime Severity Level" on a table of offenses listed from least severe ("Level I") to most severe ("Level VII") (Pl.'s Ex. 4 at 2 ("Crime Severity Levels")). The table classifies aggravated assault as a "Level V" offense. Next, the hearing examiner calculates the inmate's "Total Parole Success Likelihood Score" on a "Parole Decision Guidelines" chart (Pl.'s Ex. 5 at 18; Def.'s Ex. 5; Def.'s Ex. 6). This score represents the sum of eight numerical "Parole Success Factors," historically-based data such as the inmate's number of prior convictions, previous parole or probation violations, and history of drug use. Based upon plaintiff's criminal and social history, plaintiff received a Total Parole Success Likelihood Score of 14.

Once the hearing examiner calculates the Crime Severity Level and Total Parole Success Likelihood Score, the examiner uses the two figures to identify the recommended number of "months-to-serve" on a Parole Decision Guidelines Grid (Pl.'s Ex. 4 ("Guidelines Grid")). For a "Level V" offense with a Parole Success Likelihood Score of 14, the Guidelines Grid recommends that the inmate serve 34 months before being eligible for parole. Notably, the Guidelines Grid describes Parole Success Likelihood

Scores in the 14-20 point range as "EXCELLENT."

The hearing examiner then calculates the inmate's TPM based upon the recommended months-to-serve from the Guidelines Grid. In plaintiff's case, for example, the 34 months-to-serve calculation would have generated a recommended TPM of October 2001. Yet, hearing officers cannot submit a TPM to the Board without also considering the minimum parole eligibility requirements: (1) the one-third time-served requirement under O.C.G.A. § 42-9-45(f); and (2) the 90% time-served policy. Further, according to Sullivan, the Director of the Board's Clemency Administration & Parole Selection Division, hearing examiners are instructed to recommend the lengthiest number of months-to-serve to the Board. Thus, as Baustin testified, the TPM date that the hearing examiner recommends to the Board will represent the greater of either (1) the inmate's Guidelines Grid score; or (2) 90% of the inmate's court-imposed prison sentence, if applicable to his offense.

Given his lack of involvement in plaintiff's initial TPM calculation, Baustin could only speculate as to why the Board assigned plaintiff a TPM of June 2003 instead of October 2001, the Guidelines Grid recommendation. He admitted, however, that the hearing examiner's application of the 90% time-served policy was the most likely explanation for the approximately 20-month disparity.

B. The Board's Discretion

Sullivan observed that, aside from the statutory minimum threshold set forth under O.C.G.A. § 42-9-45(f), the Board is not bound by the 90% time-served policy, the hearing examiner's TPM recommendation, or any other calculations made by the hearing examiner. In fact, Sullivan asserted, in making his recommendation, the hearing examiner is "just doing math for the Board." He further

testified that nothing prevents the Board from exercising its discretion, and that, in hundreds of cases, the Board has actually departed upward from the recommended TPM date resulting from the application of the 90% time-served policy. Additionally, Sullivan noted that even after the Board votes to approve a particular TPM date, the Board retains discretion to modify that date at any time, which it often does.

Masters, the Board's Director of Legal Services, likewise testified that the 90% policy is merely a "policy" that lacks the effect of law. Rather, she contended, the 90% time-served policy may be modified by the Board at any time, via a majority vote of its members. Masters argued that in enacting the policy, the Board simply wished to promulgate the manner in which it planned to exercise its discretion. The Board hoped to inform attorneys, judges, and criminal defendants of its intentions, and to dispel public misconceptions about Georgia's pardon and parole system.

Similarly, Baustin observed that the 90% time-served policy is "just another factor" the Board considers in making parole decisions. He noted that, irrespective of the hearing examiner's recommendation, the Board makes an individualized determination in each case.

On the other hand, on cross-examination, plaintiff elicited testimony from Sullivan indicating that, out of over 8,000 cases, the Board deviated downward from the 90% time-served policy only 10 or 11 times. Further, the Board apparently deviated downward in those 10 or 11 cases because of extraordinary circumstances (i.e., where the inmates at issue had rendered substantial assistance to prosecutors). Although Masters had similarly contended that the Board's broad discretion vitiated the importance of the 90% time-served policy, she admitted on cross examination that the Board follows the hearing examiner's TPM recommendation "all the time," perhaps in as many as 80%

of the cases the Board reviews.

C. Reconsideration of the Board's TPM Notice

After the Board votes to accept or deny the TPM recommendation submitted by the hearing examiner, the Board notifies the inmate of its decision via a "Parole Decision Guidelines--Notice of Tentative Action" (Parole Decision Guidelines). Said notice includes, inter alia, the Board's TPM recommendation, the months-to-serve calculation generated from the Guidelines Grid, and the cumulative Parole Success Likelihood Score. Further, the notice indicates that "[a]ll decisions made by the Board are tentative and may be changed at the discretion of the Board at any time." At this point, the inmate may request that the Board reconsider his recommended TPM date.

Baustin, who personally reviewed plaintiff's request for reconsideration, testified that in his 23 years of employment with the Board, he has reviewed approximately 1,200 TPM "appeals" per year. Further, Baustin indicated that he has deviated from the Board's TPM decision, and recommended a different TPM, in approximately 20% of those cases. Baustin was unable to determine whether the TPM deviations within that 20% reflected months-to-serve increases, or months- to-serve decreases, but he reiterated that the Board ultimately has discretion to adjust the recommended TPM date in either direction.

When asked by the court whether, on reconsideration, the hearing examiner was authorized to deviate from the Guidelines Grid calculations, Baustin explained that the hearing examiner may include "comments" with his recommendation (Def.'s Ex. 6). Baustin noted that the hearing examiner's TPM recommendation is not always "strictly by the grid," but that all of the pertinent Guidelines Grid figures are provided to the Board for review. Further, Baustin testified that the hearing examiner may include a

"policy" recommendation in his submission to the Board.

On the other hand, Baustin's testimony also disclosed that the TPM "appeal" process is somewhat of a misnomer. In practice, the hearing examiner who reviews the inmate's request for reconsideration will not re-calculate the inmate's TPM, re-submit the inmate's parole eligibility data to the Board, or otherwise adjust the inmate's TPM date in any way absent a mathematical error warranting reconsideration. The "reconsideration" process may thus be more accurately described as a request for a TPM "recomputation." Moreover, Baustin asserted that the initial hearing examiner's application of the 90% time-served policy to calculate an inmate's TPM date, and the Board's subsequent acceptance of the examiner's recommendation, is not the sort of "error" warranting recomputation. Rather, according to Baustin, requests for reconsideration filed on this basis are summarily denied by the hearing examiners, ending the review process.

The typical errors Baustin encounters pertain to miscalculated Crime Severity Levels and Parole Success Likelihood Scores, and erroneous applications of the Board's 90% time-served policy (i.e., where the inmate's underlying offense does not fall within the group of offenses covered under the policy). Baustin discovers such errors in approximately 10% of the 30 requests for reconsideration he reviews each week. Even where computation errors are discovered, however, the hearing examiner will not re-submit a case to the Board for reconsideration if the case falls under the 90% time-served policy.[5]

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[5] Presumably, Baustin meant that such reconsideration would not take place, as a general rule, because the TPM date generated by the 90% time-served policy typically exceeds the Guidelines Grid recommendation.

Finally, with respect to plaintiff's requests for reconsideration, Baustin observed that he personally denied plaintiff's requests on January 18, 2001 and February 17, 2001. Baustin asserted that, the Board having accepted the initial hearing examiner's 90% time-served recommendation, he saw no reason to depart from the TPM date at issue. Rather, Baustin testified, the Board would not likely have reconsidered its decision anyway. Baustin noted that although the Board has not made any official declaration to him indicating that the application of the 90% time-served policy is mandatory, the Board has "made it clear that ... [it] would not reconsider the 90% policy" in the TPM "appeal" context.

D. Plaintiff's Parole Success Likelihood

As to the likelihood that plaintiff would have received an earlier TPM but for the Board's application of the 90% time-served policy to his offense, Masters indicated that, in her opinion, such a result was unlikely. Rather, she testified that plaintiff's sentence was unusually short in proportion to the severity of his offense, that the recommendations generated from the Guidelines Grid do not bind the Board, and that irrespective of the adoption of the challenged policy, the Board could have required plaintiff to "max out," or serve his entire 5-year term of incarceration. In Masters' opinion, plaintiff's court-imposed prison sentence was unusually short in relation to similar offenses because the sentencing judge was probably aware of the Board's 90% time-served policy and considered the policy in rendering his sentence.

Utilizing incarceration data for aggravated assault offenders in the Georgia prison system, Sullivan also testified that, in his opinion, plaintiff's sentence was lighter than one might expect given the victim's injuries, plaintiff's use of a weapon, his prior criminal record, and his flight from the police (Def.'s Ex. 12). Further, Sullivan's testimony

indicated that the average periods of incarceration imposed by the State of Georgia upon relevant aggravated assault offenders decreased slightly from 1996 (6.5 years imposed) through 2000 (5.9 years imposed), while the average time-served for such offenders increased slightly during the same period (from 2.9 years served in 1996 to 3.2 years served in 2000) (Def.'s Ex. 12). Thus, these statistics arguably corroborated Masters' contention that plaintiff received a lighter sentence because of the Superior Court's awareness of the 90% time-served policy. Yet, Sullivan also acknowledged that plaintiff received the maximum statutory sentence of 20 years, with 5 years to serve, and that plaintiff's "good work history" would have been considered at sentencing.

III. Plaintiff's Motion for Equitable Judgment

A. 42 U.S.C. § 1983

To articulate a cognizable claim under 42 U.S.C. § 1983, "plaintiff must show that a person, acting under color of any statute, ordinance, regulation, custom, or usage, deprived him of a right, privilege, or immunity secured by the Constitution." Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F.Supp.2d 1320, 1328 (N.D.Ga.2000). Plaintiff's § 1983 claim is rooted in the Board's alleged violation of plaintiff's rights under the Ex Post Facto Clause of the United States Constitution [1-1]. See U.S. Const. Art. I, § 10, cl. 1. The alleged violation stems from the Board's retroactive enforcement of its 90% time-served policy against plaintiff, thus the Board may fairly be characterized as "acting under color" of state law within the meaning of § 1983. 42 U.S.C. § 1983.

B. Analysis of Plaintiff's Ex Post Facto Claim

1. Ex Post Facto Standard

To prove that a retroactively applicable parole board procedure violates the Ex Post Facto Clause, a prisoner must show that the challenged action "creates a significant risk of prolonging [his] incarceration." Garner v. Jones, 529 U.S. 244, 251 (2000). In two recent opinions, one of which originated in this very district, the United States Supreme Court suggested that a retroactive amendment postponing a prisoner's initial parole eligibility date would offend the constitutional ban on Ex Post Facto legislation. See Garner, 529 U.S. at 250-51 (2000); California Dep't of Corrections v. Morales, 514 U.S. 499, 511 (1995). Additionally, nearly thirty years ago the Supreme Court observed that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the Ex Post Facto clause [citations omitted] of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (emphasis added) (quoting Rooney v. North Dakota, 196 U.S. 319, 325 (1905)). That same Supreme Court cited, with apparent approval, a decision of the United States Court of Appeals for the Ninth Circuit holding that "[u]nder California law, a convicted person's eligibility for parole consideration (as opposed to parole) is part of the 'law annexed to the crime when committed' ... and any legislative change in such eligibility which would work to a prisoner's disadvantage may not be retroactively applied." Love v. Fitzharris, 460 F.2d 382, 383 (9th Cir.1972), vacated on other grounds, 409 U.S. 1100 (1973). See also Akins v. Snow, 922 F.2d 1558, 1563 (11th Cir.1991), cert. denied, 501 U.S. 1260 (1991) (opining that the Ex Post Facto Clause "applies to a change in parole eligibility" because "parole eligibility must be considered part of any sentence....").

Nevertheless, the Supreme Court has declared that there is no "simple formula" for determining whether official rules or procedures violate the Ex Post Facto Clause. Garner, 529 U.S. at 252. Rather, in the pardons and paroles context,

the inquiry ultimately boils down to whether, in light of all of the relevant facts and circumstances, the prisoner can show "through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than [he would have received] under the earlier rule." Id. at 255. To make such a showing, the inmate need not prove "that he definitely would have served a lesser sentence under the previous legal regime," Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, 1149 (11th Cir.1995) (emphasis omitted) (citing Miller v. Florida, 482 U.S. 423, 432 (1987)), only that the challenged procedure creates a "sufficient risk" of doing so. Morales, 514 U.S. at 509.

To inform this analysis, courts should examine the parole board's internal policy statements, for "[a]t a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether ... the amendment [at issue] ... create[s] a significant risk of increased punishment." Garner, 529 U.S. at 256. Further, such "policies and practices will indicate the manner in which [the Board] is exercising its discretion." Id.

Ex Post Facto Clause analysis also requires courts to gauge the level of discretion actually exercised by the parole board in question. For example, both Garner v. Jones, 529 U.S. 244, and Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, involved ex post facto challenges to certain parole eligibility procedures that were retroactively enforced by Georgia's State Board of Pardons & Paroles, the defendant in the instant litigation. The Garner court examined a Board rule that retroactively decreased the frequency, from three years to eight years, with which prisoners serving life sentences would be granted parole reconsideration hearings after an initial denial. See Garner, 529 U.S. at 247. In Jones, a Georgia inmate sought to enjoin

the enforcement of a Board rule that retroactively required "Level V" offenders to serve the greater of either (1) the recommended months-to-serve from the Guidelines Grid; or (2) one-third of the court-imposed sentence of incarceration, before being eligible for parole. 59 F.3d at 1148. Previously, only the more serious "Level VI" and "Level VII" offenders were subject to the one-third time-served requirement; "the TPM of prisoners with [Crime Severity Levels] of I through V was determined, prior to any discretionary departure, solely by reference to the [Guidelines Grid]." Id. at 1147.

Although the United States Court of Appeals for the Eleventh Circuit had found, in Garner, that the challenged rule violated ex post facto, the Supreme Court ultimately reversed and remanded for further findings on grounds that the Eleventh Circuit failed to evaluate whether the rule actually posed a sufficient risk of increasing the inmate's punishment. See Garner 529 U.S. at 255. Specifically, the Supreme Court could not determine, from the record before it, whether the Board's discretion to grant a parole reconsideration hearing during the eight-year interval in which no hearing was due, or the Board's discretion to grant expedited reconsideration hearings in the event of a change in circumstances, vitiated the underlying ex post facto concerns. See id.

Likewise, the "undisputed fact" that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM" was the key to the Eleventh Circuit's decision in Jones. 59 F.3d at 1149. Affirming the district court's conclusion that the Board's retroactive extension of the one-third time-served requirement to Level V offenders did not violate the Ex Post Facto Clause, the Eleventh Circuit opined that "the degree of the Board's continuing parole discretion implies that the TPM rule change 'create[d] only the most speculative and attenuated possibility of producing the prohibited effect of

increasing the measure of punishment for covered crimes....'" Id. (quoting Morales, 514 U.S. at 500).

Finally, several federal decisions suggest that a challenged parole eligibility method, policy, or procedure need not necessarily take the form of a law, rule, or regulation to implicate the Ex Post Facto Clause. See, e.g., Garner, 529 U.S. at 255 (opining that ex post facto plaintiff must show that the rule has the effect of retroactively increasing his punishment); United States v. Adeleke, 968 F.2d 1159, 1160 (11th Cir.1992) (opining that the retroactive use of an application note to the federal sentencing guidelines, lacking "the force of law," cannot be deemed to have "changed the law" for ex post facto purposes.); Akins, 922 F.2d at 1561 (11th Cir.1991) (opining that the rules and regulations of the Board, a quasi-legislative entity, implicate ex post facto because they have the force and effect of law); Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir.1984) (opining that the federal parole guidelines lacked "the characteristics of law ... They are not filed and rigid, but are flexible" and, therefore, did not violate the Ex Post Facto Clause); United States ex rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir.1980) (opining that any "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription."); Warren v. Baskerville, 233 F.3d 204, 208 (4th Cir.2000) (opining that a retroactive parole "policy" change "did not for ex post facto purposes have the force and effect of law."); Hill v. Jackson, 64 F.3d 163, 169-70 (4th Cir.1995) (opining that parole reconsideration "policy" did not violate ex post facto because application of the policy was not "automatic," appeals were permitted, and the policy did not affect standards for initial parole consideration); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir.1995) (observing, in dicta, that a retroactively applicable parole policy would constitute a "law" within the meaning of the Ex Post Facto Clause if it "possess[ed] the full force and effect of law...."); Geraghty v. U.S. Parole Commission, 579 F.2d

238, 267 (3d Cir.1978), vacated on other grounds, 445 U.S. 388 (1980) (noting that parole "guidelines" would violate ex post facto if applied in a fixed and mechanical way); Love, 460 F.2d at 385 (9th Cir.1972) (opining that a parole board's retroactive interpretation of a parole eligibility provision was subject to ex post facto constraints because the interpretation had the effect of law); Oglesby v. Ray, 8 F.Supp.2d 1379, 1380 (N.D.Ga.1998) (Thrash, J .), rev'd on other grounds, 180 F.3d 272 (11th Cir.1999) (applying ex post facto analysis to a retroactive parole board "policy").[6] Rather, as noted, ex post facto considerations apply in the parole eligibility context to any official policy or procedure that has the full force and effect of law, and whose practical implementation produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. Morales, 514 U.S. at 509.

2. Plaintiff's Challenge to the Board's 90% Time-Served Policy

Plaintiff contends that under the guidelines in effect

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[6] In Oglesby v. Ray, the district court initially determined that the challenged parole reconsideration "policy" withstood ex post facto scrutiny because it did not create a sufficient risk of retroactively increasing the inmate's punishment. See 8 F.Supp.2d at 1383. The United States Court of Appeals for the Eleventh Circuit subsequently reversed and remanded the case for further consideration in light of its intervening decision in Jones, 59 F.3d 1145. See Oglesby v. Ray, No. 1:97-CV-527-TWT (N.D. Ga. order filed on April 23, 1999 [19-1]). On remand, the district court found the policy violative of the Ex Post Facto Clause [26-1]; however, the Eleventh Circuit once again reversed the ruling in light of the intervening decision of the United States Supreme Court in Garner, 529 U.S. 244 [31-1]. Finally, on November 6, 2001, the district court ultimately dismissed the inmate's action as moot, given the Board's voluntary cessation of the application of the challenged policy [36-1]. Accordingly, the Eleventh Circuit never specifically addressed whether the district court properly treated the challenged "policy" as a "law" for ex post facto purposes.

when he committed his crime, he would have been entitled to an initial parole eligibility hearing on or about August 23, 2000, after having served twenty months of his five-year prison term (Pl.'s Mot. for Equitable J. at 3).[7] But for the Board's retroactive application of its 90% time-served policy to his offense, he argues, the relevant hearing examiner would have recommended a TPM date based upon service of one-third of his court-imposed prison sentence, see O.C.G.A. § 42-9-45(f); the Board would have simply adopted said recommendation as a matter of routine practice; and plaintiff would likely have been paroled on or about the adopted TPM date, given that the Guidelines Grid rated his chance of parole as "excellent." Instead, he claims, the Board rigidly enforced its 90% time-served policy against him, retroactively extending his TPM date from August 23, 2000 to June of 2003, and increasing the length of his confinement by approximately 34 months (Pl.'s Mot. for Equitable J. at 3).

According to the evidence presented at the April 10, 2002 hearing, however, plaintiff's position is not entirely accurate. Rather, the testimony of Sullivan and Baustin established that hearing examiners are instructed to recommend the lengthiest number of months-to-serve under the guidelines. Additionally, the Guidelines Grid indicates that, "[f]or certain Crime Severity Level V, VI, and VII offenses, the Guidelines recommendation will be one-third of the court-imposed sentence length or the grid recommendation, whichever is greater" (Guidelines Grid (emphasis omitted)). Accordingly, even if the 90% time-served policy did not apply to plaintiff's offense, the Board would likely have adopted the 34 months-to-serve recommendation, it being the lengthier of the recommendations generated from the Guidelines Grid (34 months) and the one- third requirement (20 months).

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[7] Plaintiff contends that he is entitled to credit for time served towards his August 4, 1999 sentence (217 days of pre-trial confinement) (Compl.¶ 7).

Therefore, plaintiff could have at best expected a TPM date of October 2001 (34 months), rather than June 2003 (54 months).

Nevertheless, the approximately 20-month disparity about which plaintiff complains is not to be taken lightly. If the Board has inflexibly enforced its 90% time-served policy against plaintiff, such that its application has the force and effect of law, then the Board has created a risk of retroactively increasing his punishment. Further, if plaintiff would likely have been paroled sooner than June 2003 but for the Board's allegedly unconstitutional action, then said risk is "sufficient" to render the policy violative of the Ex Post Facto Clause. Morales, 514 U.S. at 509.

After careful review and consideration, the court answers both of these questions in the affirmative. The testimony presented to the court on April 10, 2002 established that although the Board is authorized to exercise discretion, and that the TPM recommendations are merely "recommendations" that remain "tentative" even after the Board votes to accept them, the Board does not in fact exercise any meaningful discretion in cases falling under its 90% time- served policy. Rather, the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates. The statistical evidence, the procedures in effect, the text of the resolution itself, and the Board's internal policy statements and guidelines provide overwhelming evidence, both direct and circumstantial, of this fact.

a. The Practical Implementation of the 90% Policy

The evidence presented at the April 10th hearing indicated that, from January 1, 1998 through June 30, 2001, the Board deviated below the 90% threshold in exactly 10 cases out of 8,664 (Def.'s Ex. 8). Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero. Application of the 90% time-served policy is virtually automatic; the TPM calculation generated by the 90% time- served policy will inevitably reflect the highest number of months-to-serve submitted to the Board, a figure that the Board will always adopt. Thus, the change in the TPM formula at issue in this case is a far cry from the change examined by the Eleventh Circuit in Jones, where the court determined that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM." Jones, 59 F.3d at 1149. Here, by contrast, the Board exercises unwavering adherence to the challenged 90% benchmark.

The TPM "reconsideration" process is further evidence that the Board blindly applies the 90% time-served policy. In truth, the hearing examiner who conducts this purely "paper" review exercises no discretion with respect to 90% cases. Unless an initial hearing examiner erroneously calculates the inmate's TPM date under the 90% time-served policy, when in fact the inmate's offense does not fall under that policy, hearing examiners will not re-submit recommendations to the Board even if the initial recommendations contain mathematical errors. He alone makes this decision, unilaterally ending the review process without any adversarial hearing or meaningful reconsideration.

b. The Board's Internal Policy Indicators

Likewise, the Board's December 9, 1997 resolution adopting the challenged policy, as well as the Board's related guidelines and policy statements, serve as circumstantial evidence that the 90% time-served policy is applied mandatorily. The pertinent text of the resolution provides:

> WHEREAS: Since 1991, the Board has steadily and consistently amended and refined its guidelines to provide for lengthier time-served for violent and dangerous criminals while reducing the overall number of individuals released on parole; and,
>
> WHEREAS: The Board believes that a further amendment to its statutorily mandated guidelines will further enhance public safety and make Georgia the toughest state in the nation for "time-served" for violent felonies and residential burglaries;
>
> THEREFORE: Be it now hereby resolved by the [Board] that its statutorily mandated guidelines are hereby amended to provide that any offender who is convicted on or after January 1, 1998, of one or more of [20 enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison.

(90% time-served policy at 1). This language clearly expresses the Board's intent to lengthen the actual time certain inmates serve in prison, "mak[ing] Georgia the toughest state in the nation" in this regard, and declares that, with respect to covered offenders, service of a minimum of 90% of the court- imposed term of incarceration "will be

required " (90% time-served policy at 1 (emphasis added)).[8]

The policy statement published on the Board's internet home page similarly declares that "[t]he Board requires all violent offenders ... to serve a minimum of 90 percent of their court-imposed terms of incarceration." State of Georgia Board of Pardons & Paroles, "90-Percent Policy," Parole Consideration and Eligibility (www.pap.state.ga.us/eligibility.html, visited on May 2, 2002) (emphasis added). Finally, the text accompanying the Guidelines Grid indicates:

> "Board's 90% Resolution: Pursuant to Board policy, for persons CONVICTED on or after January 1, 1998, the Guidelines recommendation will be 90% of the court-imposed prison sentence or the Grid recommendation, whichever is greater....

(Guidelines Grid). In each of these examples, no discretion is implied. Instead, the Board's language is unambiguously mandatory, further supporting plaintiff's contention that the Board's enforcement of the 90% time-served policy has the force and effect of law for ex post facto purposes.

c. Plaintiff's Parole Success Likelihood

Given this determination, the challenged action violates the Ex Post Facto Clause if there is a substantial likelihood that plaintiff would have been paroled earlier had the Board not retroactively enforced its 90% time-served policy against him. As noted, the Guidelines Grid rates the

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[8] Notably, in reviewing the parole procedures at issue in *Garner*, the Supreme Court declared: "Absent a demonstration to the contrary, we *presume* the Board follows its ... internal policies in fulfilling its obligations." 529 U.S. at 256 (emphasis added).

range within which plaintiff's 14-point Parole Success Likelihood Score falls as "excellent." Yet, both Masters and Sullivan opined that plaintiff would not likely have been paroled even if the 90% time-served policy did not apply to his offense. Masters and Sullivan explained that, in their opinion, the Superior Court sentenced plaintiff to an unusually light term of confinement, anticipating that the Board would require plaintiff to serve at least 90% of it. Thus, they argued, the Board would not likely have recommended an October 2001 TPM even without the 90% requirement.

The statistical evidence presented at the April 10th hearing nonetheless established that although plaintiff received a shorter than average prison term, his term (5 years) was shorter than average as compared to all non-life aggravated assault sentences imposed during 1998 (6.3 years), a year in which Superior Court judges would have been aware of the new 90% requirement (Def.'s Ex. 12). It is fair to infer, therefore, that the sentencing court imposed a shorter than average term not because of its awareness of the 90% requirement, but because it did not regard plaintiff's crime as particularly egregious as compared to other aggravated assaults. Further, the court notes that plaintiff's June 2003 TPM would require him to serve 54 months, or 4.5 years, a prison term that greatly exceeds the average time-served attributable to all aggravated assault offenders released from 1996 through 2001 (Pl.'s Ex. 6 at 3; Def.'s Ex. 12). The court cannot reconcile this fact with plaintiff's 34-month grid score and his parole success rating of "excellent" without concluding that plaintiff would likely have received an earlier TPM date but for the Board's retroactive application of the 90% time-served policy. Accordingly, plaintiff has made the requisite showing of unconstitutionality under the Ex Post Facto Clause.

IV. Prerequisites for Injunctive Relief

To prevail on a motion for injunctive relief, a plaintiff must establish the following four factors: (1) actual success on the merits; (2) a threat of irreparable injury; (3) that plaintiff's own injury would outweigh the injury to defendant; and (4) that an injunction would not disserve the public interest. See Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir.1999); Spottsville v. Barnes, 135 F.Supp.2d 1316, 1318 (N.D.Ga.2001) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). See also Siegel v. LePore, 234 F.3d 1163, 1213 (11th Cir.2000) (Carnes, J., dissenting). With respect to plaintiff's ex post facto claim, the court concludes that plaintiff's showing justifies the injunctive relief he seeks. Accordingly, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1].

IV. Conclusion

Having determined that the Board's retroactive enforcement of its 90% time- served policy against plaintiff is unconstitutional and invalid for the reasons set forth herein, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1]. Defendant State Board of Pardons & Paroles, its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with the State Board of Pardons & Paroles who receive actual notice of this order by personal service or otherwise, are hereby **RESTRAINED** and **ENJOINED** from taking any actions of any kind, legal or otherwise, to carry out, assert and/or enforce the 90% time-served policy as it relates to this individual--plaintiff Coleman Jackson. Defendant is hereby **ORDERED** to provide plaintiff with an initial parole eligibility hearing within **FORTY-FIVE (45) DAYS** of the issuance of this order. Further, defendant is hereby **ORDERED** to consider plaintiff's parole eligibility without regard to the 90% time-served policy. To the extent that plaintiff's counsel has moved for an order directing plaintiff's

immediate release from custody, said motion is hereby **DENIED**. Nevertheless, the court will reconsider plaintiff's request if defendant fails to comply with this order.

IT IS SO ORDERED, this 29th day of May, 2002.

s/ William C. O'Kelley
William C. O'Kelley
Senior United States District Judge